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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

WILLIAM PRADO,

Plaintiff and Appellant,

v.

RICK SANCHEZ et al.,

Defendants and Respondents.

E070030

(Super.Ct.No. PSC1501580)

OPINION

APPEAL from the Superior Court of Riverside County. James T. Latting, Judge.  
Reversed.

Willoughby & Associates, Anthony Willoughby and Anthony Willoughby, II, for  
Plaintiff and Appellant.

Law Offices Paul M. Stoddard and Paul M. Stoddard for Defendants and  
Respondents.

William Prado sued defendants Rick Sanchez, Paul Sanchez, and Dominic Teran for assault and battery and intentional infliction of emotional distress.<sup>1</sup> The trial court granted defendants' motion for summary judgment on the basis of a procedural defect in Prado's opposition papers. More specifically, Prado initially failed to file most of the evidence that he cited in his separate statement. Six days later, he filed the omitted evidence. Prado appeals, contending that the court abused its discretion by granting summary judgment on the basis of the procedural defect. "In light of the strong policy favoring disposition of cases on their merits," we agree. (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1202 (*Parkview*).) We therefore reverse the judgment with directions to reconsider the motion after allowing defendants to file a new reply brief.

## BACKGROUND

In January 2015, the parties traveled to a resort in the Dominican Republic for a wedding. This lawsuit arises from an altercation that occurred there.

### *I. Defendants' Evidence and Motion for Summary Judgment or Summary Adjudication*

On the third day of their stay in the Dominican Republic, defendants and their wives went to the resort's sports bar at around 1:00 a.m. They had just come from the Hard Rock Casino. Prado arrived at the same bar approximately thirty minutes later. He was with four people—Alex Reyes, another man, and two women. Prado's group had

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<sup>1</sup> Because the Sanchezes have the same last name, we will refer to them by their first names to avoid confusion. No disrespect is intended.

just come from a nightclub. Defendants' group was sitting at the bar, and Prado's group sat at a table directly behind defendants.

According to defendants, Prado appeared to be extremely intoxicated; he was slurring his words and could not walk in a straight line. He began talking to defendants and angrily yelling at them, and then he and Reyes threw glasses and beer bottles at defendants. Rick was trying to get his pregnant wife out of the bar when Prado threw a chair at him. Rick fell to the floor and cut his hands on broken glass. Rick and his wife made it out of the bar. Paul's wife was still inside the bar and observed Prado slip, strike his face on the tiled bar, and fall facedown to the floor. None of the defendants struck Prado. An ambulance arrived and took Rick to the hospital.

After Rick's injuries were treated, he and Prado appeared before a Dominican judge. The judge told them that they would have to agree to settle their differences. If either man wanted to bring charges against the other, they would have to stay in the country for three months and wait for a trial. Even though he did not cause Prado's injuries, Rick agreed to settle the matter because he wanted to get his wife home as soon as possible. She did not look well, and he was concerned about the safety of their unborn child. Prado insisted that Rick pay for Prado's medical expenses. An attorney drafted a settlement agreement to this effect in Spanish. Prado's uncle read it to him in Spanish and English, and Prado and Rick signed it. Rick paid three of Prado's medical bills presented to him.

On December 12, 2016, defendants moved for summary judgment or, in the alternative, summary adjudication. They noticed the hearing for March 3, 2017. On the

basis of the foregoing evidence, defendants argued that they were entitled to summary judgment because they did not “perform any of the alleged acts of assault, battery and intentional infliction of emotional distress.”<sup>2</sup> They further argued that the settlement agreement barred Prado’s causes of action.

## *II. Prado’s Evidence and Opposition to the Motion*

Prado filed his opposition memorandum and separate statement on February 17, 2017. For the most part, the separate statement cited pages of his deposition testimony to support his version of events. To a lesser extent, his separate statement cited a declaration from Reyes, defendants’ responses to special interrogatories, and evidence of medical bills. But Prado filed only the Reyes declaration and Prado’s medical bills on February 17, 2017.

Reyes explained that he went to the sports bar with Prado and others and saw defendants there. He was looking at his phone when he “heard a commotion and looked up” to see Paul approaching Prado. Prado had his hands up. Teran then punched Reyes, and when Reyes looked back to Prado, Paul was “trying to fight [Prado],” and Prado still had his hands up. Reyes attempted to leave the bar, but all three defendants attacked him. Although he fended them off and left the bar, other patrons told him to go back and check

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<sup>2</sup> The complaint is not part of the record on appeal. As set forth above, the motion for summary judgment treated the complaint as alleging only assault and battery and intentional infliction of emotional distress. In opposition, Prado’s memorandum of points and authorities characterized this action as a “civil complaint for assault and battery, and intentional infliction of emotional distress.” We thus assume that the complaint alleges only these causes of action.

on Prado. He found Prado lying facedown on the floor with teeth by his head. He picked Prado up and was walking out of the bar with him when Teran tried to rush them.

Prado's separate statement described the altercation from Prado's point of view with reference to his (omitted) deposition transcript. According to the separate statement, Prado was not intoxicated and could walk fine. He did not initiate conversation with defendants. Instead, Paul started a conversation with Reyes that escalated into an altercation. Prado never threw glasses or bottles of beer, and he did not know how Rick came to be on the floor with cuts on his hands. Prado tried to leave the sports bar after Rick's wife told Prado to "just go." He turned his back to leave, and Teran punched him in the back of the head, causing him to fall to the floor. All three defendants beat him while he was lying on the floor. Prado was taken to a hospital, where he had surgery to treat his injuries. After the surgery, he was taken to a courthouse, where he was told that he would have to settle with Rick or wait three months for a hearing date. Prado did not want to sign a settlement agreement, but he was forced to sign one that was not read to him or explained to him in either English or Spanish. Rick had not paid any of Prado's medical bills since returning to the United States.

Prado's memorandum of points and authorities argued that there were triable issues of material fact as to whether defendants committed assault and battery. Moreover, he argued, the settlement agreement was no defense—he was coerced into signing it or had signed it under duress.

On February 23, 2017, Prado filed a "notice of errata" to his separate statement. (Boldface and capitalization omitted.) The errata stated that his initial filing had omitted

a number of exhibits through “inadvertence,” and it included the omitted exhibits, namely, Prado’s deposition excerpts and defendants’ responses to special interrogatories.<sup>3</sup> Consistent with the narrative set forth in the separate statement, Prado’s deposition excerpts described how he turned to leave and Teran punched him, and how all three defendants beat him when he fell to the floor.

In his deposition, Prado also testified about his unwillingness to sign the settlement agreement. A uniformed officer came to the hospital and told him that he needed to appear in court. He and his family followed the officer to the courthouse in a taxi. The judge told him that the only way he could leave the country as planned was to reach an agreement with Rick. An hour later, a “public attorney” presented him with the settlement agreement and told him that he had to sign it. “[A] whole bunch of officials, police guys with machine guns,” were also there when the attorney presented the agreement. Prado told the attorney that he did not want to sign. The attorney responded that, if he refused, he would go to jail for Rick’s injuries and for wasting the court’s time. Prado continued to refuse, and he was told, “Okay. You’re going to jail.” He was in pain and scared of going to a Dominican jail, so he signed the agreement “[u]nder duress.”

### III. *Defendants’ Reply*

Defendants filed their reply on February 24, 2017, the day after Prado filed the notice of errata. They primarily argued that Prado had omitted the deposition excerpts

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<sup>3</sup> The errata also included Reyes’s declaration, which Prado had previously filed, and the settlement agreement. Prado’s separate statement contained no specific citations to the settlement agreement, but in any event, defendants had already filed the settlement agreement in support of their motion.

cited in his separate statement, so the court should consider their facts undisputed. They also contended that Prado could not rescind the settlement agreement because (1) he had accepted the benefits of it when Rick paid his medical bills, and (2) any duress arose from the acts of a third party (the Dominican judge), and third party duress could not vitiate Prado's consent.

#### *IV. The Trial Court's Ruling*

The court issued a tentative ruling granting defendants' motion for summary judgment, reasoning that defendants had carried their initial burden by presenting evidence that they had not assaulted Prado. The court determined that Prado, on the other hand, had presented only Reyes's declaration, which described Reyes's involvement in the altercation but did not show that defendants had assaulted Prado. The court noted: "[Prado] also relies upon his deposition testimony. However, that deposition testimony was not filed or served." The tentative ruling concluded that there was no need to address defendants' argument that the settlement agreement barred this action.

The court heard argument on defendants' motion on March 3, 2017. Prado argued that his separate statement gave defendants notice of the facts that he was disputing, and he had filed his deposition excerpts as soon as counsel realized the omission. He further argued that the court had discretion to allow him to correct the defect in the separate statement. For their part, defendants argued that the court had discretion to reject late-filed papers where there was no finding of good cause for the late filing.

The court adopted its tentative ruling as its final ruling. It later entered a written order granting the motion for the same reasons identified in the tentative ruling. The

order explained: “The court disregarded the untimely documents filed by Plaintiff in the form of a belated ‘errata[.]’ It was noted in both oral argument and defendants’ reply to opposition that the deposition of Plaintiff had been taken in February 2016 and that Plaintiff had been given 75 days notice to prepare the opposition[.] The court considered only the papers and evidence submitted in a timely fashion by the parties[.] Documents submitted after the statutory due date ([i.e.,] the errata document) was not [*sic*] considered.” The court entered judgment for defendants on the complaint.<sup>4</sup>

## DISCUSSION

### I. *Standard of Review*

Defendants assert that we should review the court’s order de novo, while Prado would have us apply the abuse of discretion standard. The abuse of discretion standard is appropriate for the narrow issue that this case presents.

“We generally review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the

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<sup>4</sup> The trial court entered judgment on March 13, 2017. Prado filed a notice of appeal on May 8, 2017. (*Prado v. Sanchez et al.* (E068287).) We noted that defendants had filed a cross-complaint against Prado and ordered Prado to inform us whether there were still causes of action pending on the cross-complaint. (*Ibid.* [May 26, 2017 order].) Prado responded that the cross-complaint between the parties was “continuing.” (*Ibid.* [June 8, 2017 letter mem.].) We concluded that the appeal violated the one final judgment rule and dismissed the appeal without prejudice to Prado’s filing a later appeal from a final judgment. (*Ibid.* [June 13, 2017 order]; *Dang v. Smith* (2010) 190 Cal.App.4th 646, 656 [“The general rule is that no appeal will lie from a ‘purported final judgment . . . rendered on a complaint *without adjudicating the issues raised by a cross-complaint*’”].) In February 2018, the parties stipulated to dismiss defendants’ cross-complaint without prejudice. Prado filed a timely notice of appeal from the judgment of dismissal.



moving party as a matter of law.” (*Parkview, supra*, 133 Cal.App.4th at p. 1208.) But here, the court held that there were no triable issues of material fact only because it refused to consider Prado’s late-filed deposition excerpts. A trial court generally has discretion to refuse to consider late-filed papers of any sort. (Cal. Rules of Court, rule 3.1300(d).) Thus, the court’s exercise of discretion is the issue on appeal. We review the decision to reject Prado’s evidence for abuse of discretion. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.)

“In applying the abuse of discretion standard of review, it is not the role of the appellate court to substitute its own view as to the proper decision. [Citation.] The trial court’s discretion, however, ‘is not unlimited and must be “exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.”’ [ Citations.]’ [Citation.] Moreover, we carefully examine a trial court order finally resolving a lawsuit without permitting the case to proceed to a trial on the merits.” (*Parkview, supra*, 133 Cal.App.4th at p. 1208.)

## II. *The Refusal to Consider Prado’s Deposition Excerpts*

An opposition to a motion for summary judgment “shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed . . . . Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence.” (Code Civ. Proc., § 437c, subd.

(b)(3).)<sup>5</sup> The opposition, “where appropriate,” shall also include “affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.” (§ 437c, subd. (b)(2).) The opposition “shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.” (*Ibid.*)

Prado complied in part with these procedural rules. He filed his opposition memorandum and separate statement 14 days before the summary judgment hearing. His separate statement cited the evidence on which he was relying, including the specific page and line numbers of his deposition transcript. But he filed and served the cited deposition excerpts and other omitted evidence only eight days before the hearing.

Under the circumstances of this case, the trial court abused its discretion by refusing to consider the late-filed evidence and granting summary judgment on that basis. The summary judgment procedure is supposed to weed out cases in which no triable issues of material fact exist, thus eliminating the need for a trial. (*Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97 (*Security Pacific*).) Success on a summary judgment motion requires a strong showing by the moving party. (*Ibid.*) Courts strictly construe the evidence of the moving party, liberally construe the evidence of the opposing party, and resolve any doubts about the propriety of summary judgment against the moving party. (*Ibid.*) “These strict procedural rules for the protection of the opposing party are stripped away when the court grants the motion because of a

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<sup>5</sup> Further undesignated statutory references are to the Code of Civil Procedure unless otherwise indicated.

procedural error by the opposing party. . . . Granting the motion on purely procedural grounds amounts to a windfall for the moving party. [¶] Thus, granting a motion for summary judgment based on a procedural error by the opposing party is equivalent to a sanction terminating the action in favor of the other party.” (*Ibid.*)

“Terminating sanctions such as an order granting summary judgment based upon procedural error “have been held to be an abuse of discretion unless the party’s violation of the procedural rule was willful [citations] or, if not willful, at least preceded by a history of abuse of pretrial procedures, or a showing [that] less severe sanctions would not produce compliance with the procedural rule.”” (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364, fn. 16.) In most cases, “[a]ppropriate, limited sanctions for th[e] procedural error are proper; ‘terminating sanctions’ are not.” (*Parkview, supra*, 133 Cal.App.4th at p. 1216.)

The court’s order amounting to a terminating sanction was error because none of the circumstances justifying such a sanction existed. There was no showing that Prado’s late filing was willful. Indeed, counsel stated that she inadvertently omitted the evidence, and she sought to correct the error as soon as she realized it. Likewise, there was no indication that Prado had previously abused pretrial procedures. (*Levingston v. Kaiser Foundation Health Plan, Inc.* (2018) 26 Cal.App.5th 309, 317 (*Levingston*) [finding no evidence that the plaintiff willfully failed to file an opposition to a summary judgment motion and no history of abusing procedures].) And there was no showing that less severe sanctions would be inadequate. The trial was still one month away at the time of the summary judgment hearing. The court could have continued the hearing to allow

defendants to file a new reply memorandum taking account of the deposition excerpts and interrogatory responses, and the court could have assessed fees and costs against Prado as a sanction for the late filing. (*Parkview, supra*, 133 Cal.App.4th at p. 1212 [where the plaintiff filed a defective separate statement, the trial court had discretion to continue the hearing to allow the plaintiff to file a proper separate statement, “conditioned on a payment of an award of fees and costs imposed as a sanction” against the plaintiff].) The continuance need not have been longer than the 14-day statutory deadline for opposition papers. This case is not complex, and defendants should have been familiar with the late-filed evidence. Prado’s deposition occurred in February 2016, 10 months before defendants filed their motion, and the omitted interrogatory responses were their own.

In *Levingston*, this court held that the trial court erred in granting the defendant’s summary judgment motion and denying the plaintiff a continuance to oppose the motion. (*Levingston, supra*, 26 Cal.App.5th at pp. 317-319; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161 [“An order based upon a curable procedural defect (such as the failure to file a separate statement), which effectively results in a judgment against a party, is an abuse of discretion”]; *Security Pacific, supra*, 4 Cal.App.4th at p. 91 [holding that the court abused its discretion by granting summary judgment on the basis of the opposing party’s failure to file a separate statement].) The plaintiff had not filed an opposition because of an apparent miscommunication between her former counsel and her new counsel. (*Levingston*, at pp. 311-312.) Relying on the factors showing error in this case, this court concluded: “The bottom line is that, under the circumstances here—

no willfulness, no previous procedural abuses, and no prejudice [to the defendant]—the trial court should not have scourged [the plaintiff] for her new counsel’s sin.” (*Id.* at pp. 318-319.) We arrived at this conclusion even though we found counsel’s excuse for the error “unbelievable” and “mind-boggling.” (*Id.* at p. 317; see *Parkview*, *supra*, 133 Cal.App.4th at p. 1202 [characterizing the procedural error as “unacceptable,” yet nevertheless holding that the court abused its discretion by granting summary judgment on the basis of the error].)

By no means are we endorsing counsel’s lack of attention to important details. But as in *Levingston*, *supra*, 26 Cal.App.5th 309 we conclude that Prado should not have suffered a terminating sanction for counsel’s curable error. In the absence of willful misconduct, a history of procedural abuses, and a showing that less severe sanctions would not suffice, a terminating sanction was not appropriate.

Further, the court’s refusal to consider Prado’s late-filed evidence was prejudicial error. It is reasonably probable that, had the court considered the evidence, the court would have denied the motion for summary judgment. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802.) In his deposition, Prado painted a picture of the altercation that differed vastly from the picture painted by defendants. According to Prado, defendants beat him while he was lying on the floor. According to defendants, they never struck him, and he was the one who threw glasses and beer bottles at them. These disputed facts show that there were triable issues of material fact on whether defendants committed assault and battery and intentional infliction of emotional distress. Moreover, Prado’s deposition testimony shows triable issues of material fact on Rick’s settlement

defense. (The other defendants, Paul and Teran, are not parties to the settlement agreement.) Prado testified that he signed the settlement agreement under duress.

We decline, however, to decide the merits of the summary judgment motion without first giving defendants an opportunity to respond to the late-filed evidence. Prado served the evidence by mail the day before defendants filed their reply, so they did not have time to incorporate into their reply substantive arguments or objections to the evidence. On remand, defendants should have the chance to file a new reply, and the court should schedule another hearing on the motion. (*Levingston, supra*, 26 Cal.App.5th at p. 319 [remanding for the plaintiff to file an opposition to the summary judgment motion and for the court to hear the motion again]; *Parkview, supra*, 133 Cal.App.4th at pp. 1216-1218 [remanding for the court to consider the merits of the summary judgment motion, whether or not the court permits the plaintiff to correct the defects in its separate statement].)

Defendants do not address any of the case law holding that terminating sanctions are an abuse of discretion under circumstances like those here. Instead, they contend that the court had broad discretion to refuse to consider late-filed evidence “without a prior court order finding good cause for late submission.” (*Bozzi v. Nordstrom, Inc., supra*, 186 Cal.App.4th at p. 765.) They argue that the court did not err because Prado did not show good cause for the late filing. Even if Prado has not shown good cause, it does not follow that the court properly granted summary judgment on the basis of the court’s refusal to consider the late-filed evidence. It is true that section 437c requires an opposition to be served and filed at least 14 days before the hearing “unless the court for

good cause orders otherwise.” (§ 437c, subd. (b)(2).) The trial court thus has the authority to shorten the 14-day timeline for good cause. But where the court has not shortened the timeline, the opposing party nevertheless files its papers late, and the court refuses to consider the late-filed papers and consequently grants summary judgment, the question is still whether the court abused its discretion.

Lack of good cause for the late filing is only one factor. More relevant here, where the refusal to consider the late papers resulted in a terminating sanction, are the other factors—no willfulness, no history of procedural abuses, and no showing that less severe sanctions were inadequate. In sum, the late-filed evidence was an easily curable defect, and any prejudice to defendants could have been addressed by assessing fees and costs against Prado. Such limited sanctions may have been proper, but a terminating sanction was not. (*Parkview, supra*, 133 Cal.App.4th at p. 1216.)

## DISPOSITION

The judgment on the complaint is reversed. On remand, the trial court shall (1) permit defendants to file a new reply to Prado's opposition, (2) hold another hearing on defendants' summary judgment motion, and (3) decide whether to assess sanctions against Prado in the form of defendants' fees and costs for filing a new reply and appearing at another hearing. Prado shall recover his costs of appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MENETREZ

J.

We concur:

SLOUGH

Acting, P. J.

FIELDS

J.